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Paper No. 24

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JUN 14 2005

OFFICE OF PETITIONS

In re Patent of
Smith
Patent No. 5,598,947
Issue Date: February 4, 1997
Application No. 08/377,449
Filing Date: January 24, 1995
For: Automatic Hot Food Vending Machine :

Decision on Petition

This is a decision on the petition under 37 CFR 1.378(b), filed February 14, 2005, and supplemented May 24, 2005, to reinstate the above-identified patent. This is also a decision on the petition filed in the alternative under 37 CFR 1.378(c).

The petition under 37 CFR 1.378(b) is **dismissed**.

The petition under 37 CFR 1.378(c) is **dismissed**.

Facts:

The patent issued February 4, 1997. The 7.5 year maintenance fee could have been paid from February 4, 2004, through August 4, 2004, or with a surcharge during the period from August 5, 2004, to February 4, 2005.

Petitioner alleges \$1,110 was mailed via certified mail to the Office on Saturday, February 5, 2005.

The payment was received on February 14, 2005.

The amount due for maintenance fees is set by statute and Congress usually changes these fees once or twice a year.

Petitioner has supplied a page, printed from the Office's website, indicating the fee amount due for the 7.5 year fee as \$1,045. The page was printed on August 3, 2004. On August 3, 2004, the fee amount due for a small entity submitting the 7.5 year fee was \$1,045.

Congress raised the fee to \$1,075 effective October 1, 2004.

Congress raised the fee to \$1,150 effective December 8, 2004.

The patent expired at midnight on February 4, 2005, because the fee was not timely submitted and because the payment amount was incorrect.

When one mails correspondence by certified mail, the effective date for the correspondence is the date the correspondence is received and not the date the correspondence is mailed. The fee was due by midnight of February 4, 2005. The fee was not received until February 14, 2005.

Even if the payment was accorded the date the payment was mailed, the payment would be untimely. The payment was due by midnight on February 4, 2005. The payment was not mailed until February 5, 2005.

On February 4, 2005, the maintenance fee due was \$1,150 and the surcharge due was \$65. Petitioner does not contend \$1,215 was submitted. Petitioner alleges \$1,010 was paid. The statute required \$1,215 to be paid to prevent expiration of the patent. The required fee was not paid and the patent therefore expired.

Analysis:

The petition under 37 CFR 1.378(b)

A petition to accept the unavoidably delayed payment of an unavoidably delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by:

- (1) payment of the appropriate maintenance fee, unless previously submitted;
- (2) payment of the appropriate surcharge set forth in 37 CFR 1.20, and
- (3) a showing to the satisfaction of the Commissioner that the entire delay in paying the required maintenance fee from the due date for the fee until the filing of a grantable petition pursuant to this paragraph was unavoidable.

As to (1) and (2), the maintenance fee due for a small entity after 7.5 years is currently \$1,150, and the surcharge is \$700. Petitioner has only submitted \$1,010.

As to (3), petitioner has not paid the full maintenance fee. Therefore, petitioner has not, and can not, prove the entire delay from the due date of the fee until payment of the full fee was unavoidable.

The petition under 37 CFR 1.378(c)

A petition to accept the unavoidably delayed payment of an unavoidably delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(c) must be accompanied by:

- (1) payment of the appropriate maintenance fee, unless previously submitted;
- (2) payment of the appropriate surcharge set forth in 37 CFR 1.20, and
- (3) a statement that the entire delay in the submission of the fee was unintentional.

As to (1) and (2), the maintenance fee due for a small entity after 7.5 years is currently \$1,150, and the surcharge is \$1,640. Petitioner has only submitted \$1,010.

As to (3), petitioner has not paid the full maintenance fee. Therefore, petitioner can not state the entire delay from the due date of the fee until payment of the full fee was unintentional.

Petitioner's current options:

I. Petitioner may file a request for reconsideration under 37 CFR 1.378(b).

If reconsideration of this decision is desired, a petition for reconsideration must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this two-month time limit can be granted under 37 CFR 1.136(a) or (b).

The petition for reconsideration should be entitled "Petition for Reconsideration under 37 CFR 1.378(b)."

Any petition for reconsideration of this decision must be accompanied by a non-refundable petition fee of \$400 as set forth in 37 CFR 1.17, the \$140 still owed for the maintenance fee, and the \$700 surcharge. In other words, any request for reconsideration must be accompanied by a total of \$1,240.

Any petition for reconsideration of this decision under the unavoidable standard must also be accompanied by a showing to the satisfaction of the Commissioner that the entire delay in paying the required maintenance fee from the due date for the fee until the filing of a grantable petition pursuant to this paragraph was unavoidable.

Petitioner may wish to note that, in general, nonawareness of the content of, or a misunderstanding of, PTO statutes, PTO rules, the MPEP, or Official Gazette notices, will not constitute unavoidable delay.¹ For example, a patentee is responsible for knowing when various fees are due and determining the correct amount to pay for the fees.

It is extremely important that petitioner supply any and all relevant information and documentation with his request for reconsideration. The Commissioner's decision will be based solely on the administrative record in existence. Petitioner should remember that it is not enough that the delay was unavoidable; petitioner must prove that the delay was unavoidable. A petition will not be granted if petitioner provides insufficient evidence to "show" that the delay was unavoidable. Therefore, if a request for reconsideration is filed, it must establish that the entire delay in the submission of the maintenance fee was unavoidable.

II. Petitioner may file a request for reconsideration under 37 CFR 1.378(c).

If reconsideration of this decision is desired, a petition for reconsideration must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this two-month time limit can be granted under 37 CFR 1.136(a) or (b).

The petition for reconsideration should be entitled "Petition for Reconsideration under 37 CFR 1.378(c)."

Any petition for reconsideration of this decision must be accompanied by a non-refundable petition fee of \$400 as set forth in 37 CFR 1.17, the \$140 still owed for the maintenance fee, and the \$1,640 surcharge. In other words, any request for reconsideration must be accompanied by a total of \$2,180.

Any petition for reconsideration of this decision under the unintentional standard must also be accompanied by a statement that the delay in the submission of the fee was unintentional. Petitioner does not have to supply proof the delay was unintentional but may merely supply a statement.

A copy of a blank petition form PTO/SB/66 is enclosed for petitioner's convenience. As an alternative to writing a check, or mailing a money order, petitioner may pay the required

¹ See Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (Fed. Cir. 1982) (citing Potter v. Dann, 201 U.S.P.Q. (BNA) 574 (D. D.C. 1978) for the proposition that counsel's nonawareness of PTO rules does not constitute "unavoidable" delay); Vincent v. Mossinghoff, 1985 U.S. Dist. LEXIS 23119, 13, 230 U.S.P.Q. (BNA) 621 (D. D.C. 1985) (Plaintiffs, through their counsel's actions, or their own, must be held responsible for having noted the MPEP section and Official Gazette notices expressly stating that the certified mailing procedures outlined in 37 CFR 1.8(a) do not apply to continuation applications.) (Emphasis added).

additional funds by credit card. A credit card authorization form is enclosed for petitioner's convenience.

III. Petitioner may request a refund of the maintenance fee and surcharge which accompanied the petition.

Petitioner may request a refund of the \$1,010 submitted for the 7.5 year maintenance fee by writing to: Mail Stop 16, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450. A copy of this decision should accompany petitioner's request.

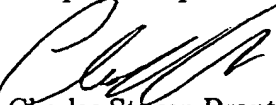
Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By facsimile: (703) 872-9306
Attn: Office of Petitions

If a request for reconsideration is filed, and a decision on the new petition is not received within three months, petitioner may wish to call the number below to check on the status of the renewed petition.

Telephone inquiries should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



Charles Steven Brantley
Petitions Attorney
Office of Petitions

Attached: PTO/SB/66
Credit Card Authorization Form



Patrick Smith
12335 Santa Monica Blvd.
Los Angeles, CA 90025

Robert L. Stoll
Commissioner for Patents
US Patent and Trademark Office
Alexandria, VA 22313-1450

Re: Petition under 37 CFR 1.378(b), filed February 14, 2005 and supplemented May 24, 2005 ???????

Dear Commissioner Stoll:

Enclosed see USPTO letter (with no date on it) although stamped "Copy Mailed Jun 14, 2005 and Office of Petitions. You have to wonder receiving letter one date. showing date "mailed" mths. before.

But, of a more serious concern, is that I didn't file any petition(s) to re-instate on June 14, 2005 Nor did I supplement it May 24, 2005. the "facts" of the letter are misrepresented (**ask for copies of the petitions**)

Please don't respond citing other assertions in letter, the issue is petitions **ask for copies of the petitions.**

Confident that you would not tolerate this fraudulent conduct I am asking you, as provided for by the Freedom of Information Act, to send me copies of these two, one a petition and the other a supplement of the former. The FOIA says any citizen referred to by name or number in some information is entitled to copy of that information requested. Letter refers to me both by name and by number patent 5598947

President Obama said re. FOIA "For a long time now there's been too much secrecy, old rules said, if there was a defensible argument for not disclosing something, it should not be disclosed
"That era is now over" President Barack Obama

FOIA Non-disclosure should not be based on an effort to protect interests of Government officials.
Thank you in advance for your cooperation with this matter. (**assumes you respect President's decree**)

Sincerely,



Patrick Smith

cc: President Barack Obama
cc: Kathryn Ruemmler, White House Counsel 1600
cc: Gary F. Locke, Secretary DOC US Dept of Commerce 1401 Constitution Ave. W DC 20230
cc: David J. Kappos, Under Secretary DOC 600 Dulany Street Alexandria VA 22313-1450
cc: Senator Patrick Leahy, FOIA revision co-author 433 Russell Senate Office Bldg W 20510